BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042.	I. 15-11-007 (Filed November 5, 2015)

REPLY COMMENTS OF THE UTILITY REFORM NETWORK ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE BEMESDERFER

Christine Mailloux
The Utility Reform Network
785 Market Street, Suite 1400
San Francisco, CA 94103
415.929.8876
cmailloux@turn.org

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Rules of Practice and Procedure, The Utility Reform Network ("TURN") files these reply comments on the Proposed Decision ("PD") of Administrative Law Judge Bemesderfer in the above referenced proceeding. Most of the carriers' opening comments predictably advocated for an anemic and incomplete conclusion to this proceeding. In opening comments, TURN, ORA, Greenlining, and CforAT opposed the PD's proposal to close the docket and urged the Commission instead to hold a Phase 2 to further define reporting requirements and consider other regulatory remedies to address the market failures that the PD aptly depicts. In contrast, the Carrier Coalition not only urged the Commission to close this docket but also argued that the reporting requirements currently in the PD are unnecessary and overstep the Commission's jurisdiction.

The Carrier Coalition stated that they "generally" agree with the PD's conclusions. But their comments reveal that they agree only with a single finding, misquoted and taken out of context, and they ignore or try to argue away the other findings in the PD.[1] Other carriers' comments were similar.[2] In contrast, CALTEL's support for the PD's findings and data reporting requirements confirms the findings in the PD that competitors' access to the network infrastructure is critical for competition (*FOF 21*) and competitive bottlenecks and barriers to entry in the telecommunications network limit new entrants and may raise prices for end-user customers (*FOF 24*). The Commission's prediction in 2006 that carriers such as CALTEL's members would bring competition to the residential market did not materialize and, instead,

[1] Coalition at p. 1 (the comments claim FOF 4 and 7(e) find that the "market for voice services is highly competitive," but the PD doesn't say that at all and only finds competition "has increased" (FOF 4) and competition in the voice services market "appears strong" (FOF7(e)), hardly a concrete finding).
[2] Verizon Wireless at p. 5-6; Consolidated at p. 3, 6-7; CTIA at p. 3-5, *but see* CALTEL at p. 1-2.

today's advantage goes to large, vertically and horizontally integrated carriers that serve nationwide markets and present "take it or leave" bundles of services that do not meet the needs of all Californians.

II. DISCUSSION

A. Proposed Decision Supports Next Steps

TURN supports the reporting requirements in the PD as a small but important step for the Commission to accomplish its goals for this proceeding a decade after its URF findings. The carriers make several arguments opposing this remedy in the PD despite the fact that the Commission, Assigned Commissioner, and Administrative Law Judge have rejected the carriers' repeated attempts to emasculate the Commission's data gathering authority in this and other proceedings. The Commission has found support for broadband reporting in federal and state statutes and has consistently rejected the carriers' overly broad interpretation of the preemptive power of Public Utilities Code §710.[3] Based on the record and legal briefing here[4], the Commission's findings and adopted remedies in this proceeding should be no different.

The Commission should also reject arguments that the data gathering is unnecessary. First, the reporting is not intended to make "all possible information" public or to provide "perfect information" as Verizon Wireless interprets the PD. Instead, it is designed to give the Commission tools and source-specific data that it can use to "carry out [the Commission's] obligation to ensure just and reasonable rates by monitoring the markets and taking action where inefficiencies are observed."[5] Second, because this reporting will be used to conduct ongoing monitoring and vigilance of market developments, CTIA's suggestion for the Commission to

[3] See, D.14-12-084 (A-Fund order Broadband Network Evaluation and find federal law may allow imputation of broadband revenue); DIVCA Pub.Util.Code §5800-5970 (broadband reporting); D.16-08-021 (Service Quality jurisdiction for VoIP reporting).
[4] Order Instituting Rulemaking (I.15-11-007) (broadband in scope); 2/4/16 ALJ Ruling (rejecting carrier motions to exclude broadband affiliates and all broadband matters from scope); 7/1/16 Scoping Memo (rigorous examination of market must include broadband).
[5] PD at p. 142

only require a one-time data report from the carriers in preparation for the 2019 report would be ineffectual. Not only does the Commission need monitoring data, but the difficulties the Commission, and parties like TURN, experienced getting granular, accurate, and meaningful data in this docket suggests relying on a single "snapshot" of data reporting is ill-advised.[6]

Third, contrary to the carriers' claims that the record and stated findings do not justify the reporting, the Commission found significant evidence of market failure and market concentration[7] that must be monitored and, as TURN argued in opening comments, directly addressed through regulatory remedies. The reporting is a critical element in the Commission's toolbox to address these issues.

Finally, TURN urges the Commission to reject the procedural objections that even this minimal data gathering goes beyond the stated scope of the proceeding and constitutes an improper delegation of duties to Staff. The PD's data gathering requirements were clearly contemplated from the beginning of the docket in the OII and are in lieu of more concrete regulatory remedies. The July 1 Scoping Memo very clearly reaffirmed the "scope described by the OII and its attached Information Requests."[8] The July 1, 2016 Scoping Memo outline also put the carriers on notice by requesting comment about the factors, metrics, and sources of data that the Commission can and should use to measure competition and ensure just and reasonable prices. It would make no sense to require the Commission to open an entirely new docket, or even a Phase 2 of this docket, merely to confirm that the ongoing collection of such data is valuable and necessary to inform the Commission's efforts to uphold its statutory duties.

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[6] *See*, PD at p. 84 (footnote noting an unexplained "significant anomaly" in AT&T reported data); PD at p. 111 ("Obtaining reliable data has been problematic at every level").
[7] *See* PD at p. 68 (mobile voice increase concentration); p. 72 (voice market moderate concentration); p. 86 (broadband market highly concentrated).
[8] July 1 Scoping Memo of ALJ and Assigned Commissioner at p. 4.

It is equally nonsensical to hamstring the Commission Staff and prevent them from adjusting the data collection effort on their own initiative. Propounding and analyzing data requests are core functions of Commission Staff and this Commission should not unnecessarily tie their hands as they assess market conditions and customer behavior.[9]

B. Findings and Conclusions in the PD are Well-Supported

The carriers claimed that several of the conclusions in the PD are not supported by the record. These attempts to weaken the PD should be rejected. For example, the Coalition and CTIA argued that there is no evidence in the record that carriers engage in "micro-targeting" or charging different rates in different geographic or product markets that may limit customer choice.[10] Yet, the PD very clearly cites to evidence by Dr. Roycroft that such micro-targeting and other pricing strategies, including reliance on bundles, are responses to market entry by other facilities based carriers (or lack of) and can negatively impact customer demand and choice.[11] Moreover, the absence of micro targeting in parts of the state is telling. Dr. Roycroft notes that it is precisely the lack of meaningful, customer-friendly price responses by ILECs and large cable companies that demonstrates the weakness, or in some places the nonexistence, of "mavericks" in the California market offering services that could provide competitive pressure.[12]

Several comments take issue with the Commission's use of a broadband standard of 25 Mbps download speed and 3 Mbps upload speed. This assumption flows through much of the PD's broadband analysis as it finds mobile broadband to be an inadequate substitute and the market for high-speed fixed broadband to be highly concentrated. The PD more than adequately

[9] The PD language regarding staff authority is similar to language just adopted by the Commission in the LifeLine proceeding allowing staff to "request any information related to the program" including *but not limited to* a list of specified information. (D.16-10-039). Moreover, Commission staff has broad audit authority that requires robust data gathering capability.
[10] Coalition at p. 3; CTIA at p. 9.
[11] PD at p. 53, FOF 13; Exh 54(Roycroft June) p. 112-113, 124-125.
[12] Exh. 54 (Roycroft June) p. 124-127; PD at p. 59, 95.

supports the use of this common benchmark.[13] TURN, through its expert witness testimony, along with other parties, urged the Commission to reject the carriers' repeated attempts to dumb down the analysis in this proceeding by assuming slower broadband speeds. The FCC has repeatedly supported this broadband benchmark and, if this Commission's analysis is to remain timely and relevant over the next several years, then it must look at current technology and look at the services customers are demanding, including higher speed services.[14]

While some carriers criticize the Commission for adopting a broadband speed benchmark that is too aggressive, they also urge the Commission to rely on alternative technologies including over-the-top voice services and social media that require reliable and high quality broadband access. Carriers also argue the Commission should have included mobile virtual network operator ("MVNO") providers. However, the PD has correctly noted that the FCC has declined to consider MVNOs as having a significant impact on competition, which is also Dr. Roycroft's position.[15] Moreover, the PD explains why both over the top ("OTT") and MVNO are inadequate substitutes that do not provide a choice of reliable service and related price discipline.[16]

III. CONCLUSION

TURN urges the Commission to make the changes to the PD discussed in detail in TURN's initial comments, and to reject carrier attempts to narrow and weaken the PD.

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Respectfully submitted,
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Christine Mailloux, TURN

[13] PD, at p. 10, 42-43 (discussing FCC adoption and comparing to the higher speeds of other countries)
[14] PD at 85 (noting that at almost any speed, over half of Californians are faced with, at best, a duopoly for high speed service). TURN also notes these same carrier parties urge the Commission to look at theoretical 5G wireless technology as an alternative.
[15] PD at p. 66.
[16] PD at p. 61 (OTT can only provide "best efforts" service and as Dr. Aron notes, are considered "apps" requiring a broadband connection), p. 66 (MVNOs wholly dependent on host network).